Introduction

Those who would renegotiate the boundaries between church and state must … answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

McCreary County v. *ACLU*, 545 US 844, 882 (2005) (O'Connor, J., concurring)

The year 2005 marked a milestone in the history of the US Supreme Court. With the death of Chief Justice William H. Rehnquist, an era in Court chronology that had lasted since 1986 – the Rehnquist Court – ended, and with the appointment of Chief Justice John G. Roberts, Jr., a new one began. Another momentous change occurred that same year. In the summer of 2005, Justice Sandra Day O'Connor, the first ever woman to serve on the Court, announced her retirement from the bench. Though Chief Justice Roberts had initially been nominated for Justice O'Connor's seat, the unexpected passing of Chief Justice Rehnquist led to a change in plans. Instead, Justice Samuel A. Alito succeeded Justice O'Connor.

Justice O'Connor had long been considered a particularly important voice on the Court in the area of religion clause jurisprudence, and in 2005, just prior to her retirement, two landmark decisions involving displays of the Ten Commandments on public property were handed down.[1] Indicative of the disagreement on Establishment Clause issues, the two cases spawned a total of ten opinions from the nine justices, resulting in what one observer called "a dizzying array of widely divergent interpretations of the Establishment Clause."[2] In one of those two cases, Justice

[1] *Van Orden* v. *Perry*, 545 US 677 (2005) (involving a monument of the Ten Commandments on the lawn in front of the Texas State Capitol); *McCreary County* v. *ACLU*, 545 US 844 (2005) (involving displays of the Ten Commandments in Kentucky courthouses).

[2] Thomas B. Colby, A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause (2006) 100 *Northwestern University Law Review* 1097, 1097.

O'Connor made the above-quoted connection between religion–state relations and comparative constitutional law.

Combining religion–state relations and comparative constitutional law might sound like a recipe for controversy. Both topics have been the battlegrounds of intense legal and political debate for several years now. A quite fascinating debate on the virtues of looking abroad in matters of constitutional law and interpretation has been taking place in the United States for more than a decade; another flare in the larger battle occurred as recently as 2010.[3] This study of the constitutional jurisprudence of the US Supreme Court and the German Federal Constitutional Court concerned with the relationship between religion and the state, focusing on the principle of state neutrality, is placed against the backdrop of that larger debate. Taking a closer look at this debate is important for several reasons. Comparative assertions are a common feature of German scholarship on religion–state relations,[4] and more recent studies have referenced the debate in the United States concerning the propriety of comparative constitutional law.[5] In German scholarship, such references to foreign law have been welcomed by some[6] and criticized by others.[7] But the disagreement between the two positions did not result in a debate as comprehensive as the one in the United States where the positions are clearly delineated and the arguments on both sides thoroughly articulated, making the US debate a useful example.

[3] *Graham* v. *Florida*, 130 S.Ct 2011 (2010). The issue featured prominently in the 1997 decision in *Printz* v. *United States*, 521 US 898 (1997), which might be considered a prelude to the current dispute. *Printz* and the later relevant decisions will be discussed in detail in Chapter 1.

[4] See e.g. Klaus Schlaich, *Neutralität als verfassungsrechtliches Prinzip* (Tübingen: J.C.B. Mohr, 1972) pp. 139–52 (discussing the United States) and *ibid*. at p. 153 (discussing France and Sweden); Christian Walter, *Religionsverfassungsrecht in vergleichender und internationaler Perspektive* (Tübingen: Mohr Siebeck, 2006) (discussing the United States and France); Axel Frhr. von Campenhausen, Der heutige Verfassungsstaat und die Religion, in Joseph Listl and Dietrich Pirson (eds.), *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland*, second edition, 2 vols. (Berlin: Duncker & Humblot, 1994) vol. I, pp. 65–8 (discussing the United States and France).

[5] See e.g. Walter, *Religionsverfassungsrecht*, p. 519 n. 122 (referencing the decisions in *Lawrence* v. *Texas*, 539 US 558 [2003], and *Atkins* v. *Virginia*, 536 US 304 [2002]).

[6] See e.g. Axel Tschentscher, Dialektische Rechtsvergleichung – Zur Methode der Komparistik im öffentlichen Recht (2007) 62 *Juristenzeitung* 807; Peter Häberle, Grundrechtsgestaltung und Grundrechtsinterpretation im Verfassungsstaat (1989) 44 *Juristenzeitung* 913.

[7] See e.g. Schlaich, *Neutralität als verfassungsrechtliches Prinzip*, p. 141 n. 47 (commenting on scholarly disagreements).

The first two chapters trace the US debate surrounding comparative constitutional law and place it into a wider societal context. Two underlying discourses can be identified, namely the "culture wars" thesis and American exceptionalism. Both, as will be shown, are closely connected to the constitutional interpretation of the religion clauses so that exploring the roots of these discourses proves particularly instructive for the later inquiry into state neutrality.

Engaging in a comparative analysis of the concept of state neutrality in religion–state relations, moreover, gives credence to earlier observations that there are many similarities despite significant differences in the overall doctrinal framework.[8] Perhaps unaware of, or disagreeing with, these earlier observations, current German scholarship sometimes tends to make seemingly reflexive, broad-brush assertions about the situation in the United States.[9] As a result, the situation in the United States is oftentimes overstated when scholars submit that there is a strict exclusion of all forms of religious expression from public life akin to the separation models implemented in France and Turkey.[10] Referencing the United States in this context is highly questionable.

Neutrality is a notoriously difficult concept because it seems almost impossible to define an abstract, universally applicable, single meaning. But it can be approximated, and engaging in a comparative inquiry helps our understanding of what neutrality means. This study aims to offer some insight into how a comparative approach might work on the limited issue of neutrality in religion–state relations. Instinctively, there is a

[8] Schlaich, *Neutralität als verfassungsrechtliches Prinzip*, p. 140; Walter, *Religionsverfassungsrecht*, p. 608.

[9] See e.g. Axel Frhr. von Campenhausen and Heinrich De Wall, *Staatskirchenrecht*, fourth edition (Munich: C.H. Beck, 2006) p. 348 (pointing out that the US system is much further away from radical separation than the German literature often suggests).

[10] Somewhat surprising additions to the list include the Soviet model or other totalitarian regimes: see Martin Heckel, Das Gleichbehandlungsgebot im Hinblick auf die Religion, in Listl and Pirson (eds.), *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland*, vol. I, p. 634 (speaking of sharp laicist separation systems in France, the United States, and the Soviet Union); von Campenhausen, Der heutige Verfassungsstaat und die Religion, p. 63 (contrasting separation systems in the United States, France, the totalitarian regimes in Germany during the Nazi period and in the GDR with the German separation systems of the Weimar Constitution and the Basic Law). Winfried Brugger developed a useful taxonomy of the different systems of church–state relations, demonstrating that not all separation systems can be lumped together: see Winfried Brugger, On the Relationship between Structural Norms and Constitutional Rights, in Winfried Brugger and Michael Karayanni (eds.), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Berlin and New York: Springer, 2007) p. 21.

widely shared, strong intuition that state neutrality is important in liberal democracies. But why? And how can it be operationalized? The answers given in the two constitutional systems examined here help illuminate the elusive content of the neutrality principle.

The scope of this study is admittedly limited: I consider only two countries and only one narrowly applied concept. But this limited approach is deliberately chosen, because significant depth of analysis is necessary to reach meaningful results. A survey of more constitutional systems might yield other important insights, no doubt; but it would not allow for the same necessary contextual inquiry. Chapter 3 takes an in-depth look at the methodological issues that underlie this decision. At this point, however, it is important to note that the United States Constitution and the German Basic Law share an important feature. Both have nonestablishment provisions as well as fundamental rights protecting religious freedom. As will be discussed later, this is not necessarily the predominant constitutional configuration, even in Western-style liberal democracies. The First Amendment to the United States Constitution states "Congress shall make no law respecting an establishment of religion" while the Basic Law's functionally equivalent provision states that "there shall be no state church."

But this study will not solely dwell on legal doctrine. Real-world problems, as Barry Friedman correctly pointed out, do not break down into neat categories of academic disciplines; solutions sometimes require an interdisciplinary approach.[11] Since comparative constitutional law as a discipline is still in its formative stages, it "should be seen as having at best highly porous boundaries from (and perhaps more accurately overlapping concerns with) both domestic constitutional law and international law, as well as with the fields of comparative government, history, economics, sociology, and cultural studies."[12] Work in comparative constitutional law, the leading scholars in the field argue, "cannot thrive in intellectual isolation. Other disciplines, such as political science, sociology, cultural anthropology, the cognitive sciences or economics are considered necessary in pursuing meaningful results."[13]

Even though Donald Kommers in 1976 identified church–state relations as one of the "[s]ubstantive areas now ripe for transnational

[11] Barry Friedman, Taking Law Seriously (2006) 4 *Perspectives on Politics* 261.
[12] Vicki C. Jackson and Mark Tushnet, Introduction, in Vicki C. Jackson and Mark Tushnet (eds.), *Defining the Field of Comparative Constitutional Law* (Westport: Praeger, 2002) p. xx.
[13] *Ibid*., p. xviii.

comparison,"[14] few consolidated efforts to do so have been undertaken until fairly recently, yielding attempts to examine religious freedom in the United States and Germany more broadly in a comparative manner.[15] A closer look at the concept of state neutrality, however, deserves separate treatment. In the German literature, the question of neutrality in matters of religion assertedly was one of the least researched constitutional principles.[16] Yet Stefan Huster observed that the principle of state neutrality in Germany is experiencing a remarkable renaissance.[17] In the United States, neutrality likewise has been identified as "[p]erhaps the most pervasive theme in modern judicial and academic discourse on the subject of religious freedom."[18]

Legal scholars have hypothesized about a narrowing gap between the treatment of religion–state relations in the United States and Germany. This study endeavors to test that hypothesis by examining the principle of state neutrality in the constitutional jurisprudence and academic literature of both countries. Investigating the assertion of a narrowing gap and trend toward neutrality, Chapter 4 as a first step outlines the

[14] Donald P. Kommers, The Value of Comparative Constitutional Law (1976) 9 *John Marshall Journal of Practice & Procedure* 685, 691.

[15] See e.g. Thomas Gerrith Funke, *Die Religionsfreiheit im Verfassungsrecht der USA. Historische Entwicklung und Stand der Verfassungsrechtsprechung* (Berlin: Duncker & Humblot, 2006); Ulrich Fülbier, *Die Religionsfreiheit in der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika unter spezieller Berücksichtigung der jeweiligen Methodik der Verfassungsinterpretation* (Berlin: Duncker & Humblot, 2003); Winfried Brugger and Michael Karayanni offer a multi-country study in Brugger and Karayanni (eds.), *Religion in the Public Sphere*; Edward J. Eberle, Free Exercise of Religion in Germany and the United States (2004) 78 *Tulane Law Review* 1023; Edward J. Eberle, Religion in the Classroom in Germany and the United States (2006) 81 *Tulane Law Review* 67; Ingrid Brunk Wuerth, Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech (1998) 31 *Vanderbilt Journal of Transnational Law* 1127.

[16] Frank Holzke, Die "Neutralität" des Staates in Fragen der Religion und Weltanschauung (2002) 22 *Neue Zeitschrift für Verwaltungsrecht* 903, at 904. Moreover, somewhat surprisingly in light of the disagreement over the meaning of neutrality, liberal legal theory whose central concept is that of state neutrality has received relatively little attention in Germany. See Gerhard Czermak, Zur Rede von der religiös-weltanschaulichen Neutralität des Staates (2003) 22 *Neue Zeitschrift für Verwaltungsrecht* 949, at 953. A notable exception is Stefan Huster's 2002 monograph offering a liberal interpretation of the German Basic Law: Stefan Huster, *Die ethische Neutralität des Staates: eine liberale Interpretation der Verfassung* (Tübingen: Mohr Siebeck, 2002).

[17] Stefan Huster, *Der Grundsatz der religiös-weltanschaulichen Neutralität des Staates – Gehalt und Grenzen* (Berlin: de Gruyter, 2004) p. 5.

[18] Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York and Oxford: Oxford University Press, 1995) p. 77.

outcome of cases dealing with the role of religion in public schools and in the public square. The school cases involve questions of prayer and invocations, religious symbols in the classroom, and teachers' religious clothing. Outside of the school context, too, questions of the relationship between religion and the state have arisen that will be examined in further detail. Here, religious displays in courthouses serve as the point of departure.

At first glance, one might think that convergence is at work when two courts charged with interpreting the constitutions of two countries use the word "neutrality" in their analysis of the relationship between religion and the state; indeed, they appear to converge on the same word. And perhaps there might be a convergence theme.[19] Nonetheless, the underlying trajectories are decidedly different in both countries. Only a study going beneath the surface reveals the differences and commonalities.

Chapter 5 therefore turns to the uses of history in decisions of the German Federal Constitutional Court and the Supreme Court, particularly with respect to the Establishment Clause. The discussion of history in constitutional adjudication since the 1980s has accompanied discussions of originalism as an interpretive method. A great debate has been waged over the past decades about the use of originalism in constitutional interpretation. In fact, some scholars suggest that the current debate on comparative constitutional law is merely a part of the larger debate on constitutional interpretation. Originalism, however, has met significant criticism from some historians, as will be illustrated in further detail. Nonetheless, I will argue that a nonoriginalist approach to history is helpful for contextualization in constitutional adjudication and needs to be taken into account in a comparative endeavor as well.

The comparative inquiry shows that Germany and the United States appear to be getting more alike in embracing "neutrality." Considering the outcome of the respective constitutional cases describes this trend toward neutrality. The indeterminacy of history can be met with accepted approaches in historiography, allowing a comprehensive comparative examination of the term "neutrality" in historical and political

[19] See e.g. Matthias Koenig, Religion and Public Order in Modern Nation-States: Institutional Varieties and Contemporary Transformations, in Brugger and Karayanni (eds.), *Religion in the Public Sphere,* p. 13 ("In spite of historical path-dependencies, we currently observe convergent trends in the institutional arrangements of politics, law and religion").

context. Comparative constitutional analysis thus can take an inclusive interdisciplinary approach and yield meaningful insights.

Thus, Chapter 6 proceeds with discussions of the founding discourses and more closely traces the developments leading up to the cases illustrated in Chapter 4. Chapter 6 traces internal developments such as increased religious pluralism and the rise of domestic (interest) groups, among others. It also allows inquiry into the underlying assumptions of constitutional adjudication, the process of decision-making itself, and the context and environment in which the decisions are handed down. Process engagement thus entails inquiry into historical context without subscribing to originalism as an interpretive method. Chapter 7 extracts various themes to circumscribe the boundaries of neutrality and to approximate its substantive meaning and assess its utility in religion–state relations in comparative perspective. When asserting a general trend toward neutrality in Chapter 4, one has to acknowledge different concepts of neutrality and several possible configurations of religion–state relations set forth in the literature; these are further investigated in Chapter 7. The Conclusion considers the future of neutrality in comparative perspective. Though difficult to define, and likely incoherent at an abstract level, the neutrality principle nonetheless serves an important role in liberal democracies.

The argument may be summarized as follows. Despite a decidedly different constitutional framework, the discussion of state neutrality in religion–state relations breaks down into largely parallel themes. The underlying trajectory of neutrality is different in that the starting points might be identified as polar opposites: a strong notion of separation in the United States, and an extensive system of cooperation in Germany. However, a narrowing gap can be observed between the two meanings of neutrality. In the United States, neutrality as it is used today means "less distance" between church and state while in Germany, conversely, neutrality means "more distance" between church and state.

Both constitutional systems of religion–state relations are characterized by significant underlying indeterminacy, and both require a detailed historical and socio-legal understanding for context. Long-term developments lead to paradigm shifts that may be obscured by a too narrow contemporary view. But as this inquiry will demonstrate, although state neutrality remains difficult to define, it is an important concept in the constitutional law of religion–state relations in the United States and Germany.

PART I

The Comparative Approach

1

The past and present of comparative constitutional studies

The comparative study of neutrality in religion–state relations that follows does not take place in an intellectual vacuum. In addition to the rich literature on comparative law generally, there is an ever-growing body of literature on comparative constitutional law. In the United States, comparative constitutional law has lately become both an emerging field of study and a controversial notion. A quite remarkable debate has developed over the last decade on the proper role – if any – of comparative constitutional law. That debate forms the background for this inquiry.

The disagreement over a comparative approach to constitutional interpretation and study is perhaps one of the most prominent debates in contemporary US constitutional law discourse. All relevant groups of actors, including academics and judges as well as politicians, are engaged in the debate that is taking place in the scholarly literature, in opinions of the United States Supreme Court, in legislative debates in Congress, and in the media. The underlying questions touch on the core understanding of what constitutions are and how they should be interpreted. This chapter is a primarily descriptive account of that debate; the goal is not to recap the entire debate, but to address a few particularly important issues.

First, there is a long history of comparative constitutional study and of the Supreme Court's use of comparative constitutional law in its decisions. Second, the use of comparative constitutional law in three recent cases was remarkably limited; yet it caused a great uproar in the academic literature and in the political debate. Articulation of the advantages of comparative constitutional law, including caveats and cautionary notes, was met with entirely justified and reasonable critique, but also with occasional over-the-top xenophobic, nationalistic, antielitist allegations. The challenges of the comparative endeavor that certainly do exist were sometimes obscured by the, at times, harsh tone of the debate.

It does not appear, at this time, that the dust has settled; Justice Sonia Sotomayor's 2009[1] and Justice Elena Kagan's 2010[2] confirmation hearings suggest that there still are strong feelings, at least in Congress, on the inappropriateness of referencing foreign law in Supreme Court opinions. Notably, Justice Ruth Bader Ginsburg commented on the questions concerning foreign law during the Kagan confirmation hearings by contrasting the views expressed by some Senators during the hearings with statements of the Founders.[3] Indicative of the larger political importance of Justice Ginsburg's remarks, a *New York Times* editorial called the speech "an on-the-money speech" and described it as "brave."[4] In the end, what remains is the challenge to engage in meaningful comparative constitutional analysis.

1 Historical roots and renewed interest

Modern-day comparative constitutional studies might be characterized as the resurrection of an ancient endeavor that began when Aristotle

[1] See e.g. David M. Herszenhorn, "Court Nominee Criticized as Relying on Foreign Law," *New York Times*, June 26, 2009, p. A13. Justice Sotomayor apparently rejected the influence of foreign law in her response to Senator Coburn ("Unless the statute requires or directs you to look at foreign law. And some do, by the way. The answer is no. Foreign law cannot be used as a holding or a precedent or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law that doesn't direct you to that law"), although she qualified that statement subsequently with a discussion of the word "use" ("In my experience, when I've seen other judges cite to foreign law, they're not using it to drive the conclusion. They're using just to point something out about a comparison between American law or foreign law, but they're not using it in the sense of compelling a result"): Senate Committee on the Judiciary, Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court, July 15, 2009, 2009 WL 2039064 (F.D.C.H.).

[2] Justice Kagan explained in response to a question from Senator Kyl that although foreign law has no precedential value, it has informational value nonetheless ("I do believe this is an American Constitution, that one interprets it by looking at the text, the structure, our own history and our own precedents, and that foreign law does not have precedential weight. Now, in the same way that a judge can read a law review article and say, 'Well, that is an interesting perspective' or 'I learned something from it,' I think that so, too, a judge may read a foreign judicial decision and say, 'Well, that's an interesting perspective; I learned something from it'"): Senate Committee on the Judiciary, Hearing on the Elena Kagan Nomination, 2010 WL 2600871 (F.D.C.H.).

[3] Ruth Bader Ginsburg, "'A decent Respect to the Opinions of [Human]kind': The Value of a Comparative Perspective in Constitutional Adjudication," International Academy of Comparative Law, American University, July 30, 2010, available at www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_07_30_10.html.

[4] Editorial, "A Respect for World Opinion," *New York Times*, August 2, 2010, p. A22.